

SERVICE DATE - JANUARY 22, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-565 (Sub-No. 14X)

NEW YORK CENTRAL LINES, LLC—ABANDONMENT EXEMPTION—
IN MONTGOMERY AND SCHENECTADY COUNTIES, NY

Decided: January 16, 2004

BACKGROUND

This decision denies a petition filed by Cushing Stone Company, Inc. (Cushing) on October 7, 2003, asking the Board to revoke a notice of exemption pursuant to which New York Central Lines, LLC (NYC) and CSX Transportation, Inc. (CSXT) (collectively, applicants) were authorized to abandon (in the case of NYC) and to discontinue service over (in the case of CSXT) approximately 6.3 miles of railroad from milepost QGW 159.6 to milepost QGW 165.9, between South Amsterdam in Montgomery County and Rotterdam Junction in Schenectady County, NY.¹ The notice of exemption was filed under 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuance of Service.

In a decision and notice of interim trail use or abandonment (NITU) that was served on April 23, 2003, a 180-day period was authorized for the New York State Office of Parks, Recreation and Historic Preservation (New York) to negotiate an interim trail use/rail banking agreement with NYC for the entire line pursuant to the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). The trail use negotiation period was extended to April 21, 2004, by a decision that was served on October 16, 2003.²

In its petition seeking revocation, Cushing contends that the Board should declare the notice of exemption void ab initio and summarily reject it, because applicants allegedly failed to comply with the newspaper publication requirements in 49 CFR 1105.12. That provision requires an applicant in an

¹ The notice, which also embraced STB Docket No. AB-55 (Sub-No. 629X), CSX Transportation, Inc.—Discontinuance of Service Exemption—in Montgomery and Schenectady Counties, NY, was served and published in the Federal Register (68 FR 14473-74) on March 25, 2003.

² The April 23 decision also imposed a public use condition, which expired on October 21, 2003, and an environmental condition.

abandonment exemption case to “publish a notice in a newspaper of general circulation in each county in which the line is located and certify to the Board that it has done this by the date its notice (or petition for) exemption is filed.” In the notice of exemption, applicants certified that notice was published in the Daily Gazette, which is published in the city and county of Schenectady, NY.

Cushing asserts that the Daily Gazette is not a newspaper of general circulation in Montgomery County, where Cushing operates an aggregate quarry, producing crushed stone and blacktop. In a verified statement, Cushing’s president, John Tesiero, states that Cushing does not receive the Daily Gazette and was not notified of the proposed notice of exemption. He asserts that Cushing requires rail access to maximize its quarry operations and that the proposed abandonment would have an adverse impact on its operations. Mr. Tesiero states further that, had Cushing been notified of the notice of exemption, it would have either commented on the proposed abandonment, filed a petition to stay, tendered an offer to acquire the line, filed a petition to reopen, or requested a public use condition. Cushing also submitted a Resolution enacted by the Montgomery County Board of Supervisors (Board of Supervisors) on January 7, 2003, that designated two other newspapers, The Recorder and the Courier-Standard Enterprise, for publication of County legal matters in 2003. Comments supporting Cushing’s petition were submitted by Congressman Michael R. McNulty, State Senator Hugh T. Farley, the Board of Supervisors, and the Montgomery County Business Development Center.

In their reply, which was filed on October 27, 2003, applicants contend that they complied with the requirement in 49 CFR 1152.12 by publishing appropriate notice in the Daily Gazette. They argue that the Daily Gazette is a newspaper of general circulation in Montgomery County. In support, they cite data issued by the Daily Gazette on its website³ indicating that the daily edition of the newspaper is read by about 27.3% of the readers in Montgomery County, NY, and reaches about 21.7% of the households in Montgomery County. They also submitted a brochure issued by the Montgomery County Chamber of Commerce (Chamber) that lists the Daily Gazette, along with the Recorder, Courier Standard Enterprise, My Shopper, and the Albany Times Union, as newspapers that service Montgomery County.

Applicants assert further that Cushing had actual notice of the proposed abandonment. In support, they submitted a verified statement from Debbie L. Layne, who is employed by CSXT as Senior Account Manager. Ms Layne, states that, when she learned that CSXT was considering abandoning the line in September 2002, she informed Mr. Tesiero and asked him if there was any potential for rail traffic. According to Ms. Layne, Mr. Tesiero indicated that the only commodity that he had shipped by rail in the past was ballast that had been purchased by CSXT. Mr. Tesiero allegedly asked that the line be kept in place in the hope that CSXT may again purchase ballast from Cushing. Ms. Layne says that she was then advised by a CSXT employee that the ballast produced by Cushing

³ The website is <http://www.dailygazette.com/adv/reader.htm>.

did not meet CSXT's engineering standards. She states that she then informed Mr. Tesiero that CSXT would not be able to purchase ballast from Cushing in the future and that CSXT would likely abandon the line.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), an exemption may be revoked, in whole or in part, if the Board finds that: (1) it contains false and/or misleading information, see, e.g., Save the Rock Island Committee, Inc. v. St. Louis Southwestern Railway Co., Docket No. AB-39 (Sub-No. 18X) (ICC served Apr. 1, 1994); (2) regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101, see, e.g., Indiana Hi-Rail Corporation—Lease and Operation Exemption—Norfolk and Western Railway Company Line Between Rochester and Argos, IN, and Exemption from 49 U.S.C. 10761, 10762, and 11141, Finance Docket No. 32162 et al. (STB served Jan. 30, 1998); or (3) revocation is necessary to ensure the integrity of the Board's processes, see, e.g., Minnesota Comm. Ry., Inc.—Trackage Exempt.—BN RR. Co., 8 I.C.C.2d 31 (1991) (Minnesota).

When, as here, an exemption has become effective, a revocation request is treated as a petition to reopen and revoke and, under 49 CFR 1115.3(b), the petitioner must specify whether revocation is supported by material error, new evidence, or substantially changed circumstances. The petitioner has the burden of proof and must articulate reasonable, specific concerns to satisfy the revocation criteria. See Wisconsin Central Ltd.—Exemption Acquisition and Operation—Certain Lines of Soo Line Railroad Company, Finance Docket No. 31102 (ICC served July 28, 1988); Minnesota, 8 I.C.C.2d at 35; and I&M Rail Link LLC—Acquisition and Operation Exemption—Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway, STB Finance Docket No. 33326 et al. (STB served Apr. 2, 1997), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998). Under these standards, Cushing has not shown that the exemption should be revoked.

The only issue raised by Cushing in its petition to revoke is whether applicants complied with the publication requirements in 49 CFR 1152.12. This requirement was adopted to ensure that there was ample opportunity for full public participation in abandonment exemption proceedings.⁴ The record here shows that applicants have complied with the requirement in 49 CFR 1152.12.

The Board requires that notice be published in a newspaper of general circulation in each county in which the line is located. The Board does not require that the newspaper be locally published or comply with local government requirements as a newspaper that publishes certain local matters. The circulation data submitted by applicants indicate that the Daily Gazette, while published in neighboring Schenectady, NY, is received by a significant number of people in Montgomery County. The Daily

⁴ See Implementation of Environmental Laws, 7 I.C.C.2d 807, 810 (1991).

Gazette is also listed by the Chamber as a newspaper that services the Montgomery County area. Under these circumstances, publication of the notice in the Daily Gazette is sufficient to meet the publication requirements of 49 CFR 1152.12. See LI Acquisition Corp. D/B/A Upper Merion & Plymouth Railroad—Abandonment Exemption—In Montgomery County, PA, et al., Docket No. AB-405 (Sub-No. 1X), et al. (ICC served Aug. 23, 1994). Accordingly, the exemption will not be revoked. The notice did not contain false or misleading information and thus is not void ab initio and will not be rejected.

The record here also shows that Cushing had actual notice of the proposed abandonment. The testimony of Ms. Layne indicates that she informed Mr. Tesiero in September 2002 that CSXT would likely abandon the line. Thus, Cushing had ample notice that abandonment was likely and could have taken steps to ensure its opportunity to participate in any future abandonment proceeding.

With regard to the alleged need for the line, the record indicates that no traffic has moved on the line since May 14, 2000. Furthermore, nothing has been submitted by Cushing or any other potential shipper on the record here to show that there is a reasonable likelihood of future traffic that would warrant revoking the exemption. As noted, Mr. Tesiero states that, if Cushing had had notice, it would have either commented, sought a stay, attempted to acquire the line, filed a petition to reopen or requested a public use condition. Also, the Federal Register notice published on March 25, 2003, contained notice of the filing of requests for stay, offers of financial assistance, requests for reopening, and requests for public use conditions.

Aside from revocation, there may be alternatives available that could, under appropriate circumstances, either keep the line in service or preserve the line for future rail service. A verified statement from CSXT witness David S. Geraci indicates that he advised Cushing that the applicants are willing to sell the line to Cushing post-abandonment for use as an industrial track. According to Mr. Geraci, he also explained that applicants would have no interest in proceeding with the abandonment and trail use negotiations if a viable business opportunity is shown to exist on the line. Mr. Geraci states that he invited Cushing to present a business plan, including a carload commitment, that CSXT could weigh against the cost of continuing to maintain the line, but he indicates that CSXT has not received a business plan from Cushing. Finally, an interim trail use agreement under the Trails Act would rail bank the right-of-way for future rail service.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Cushing's petition to revoke and its request to reject the notice are denied.

2. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary